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No. 930

In the Supreme Court of the United States

OCTOBER TERM, 1957

ERNEST T. WALDEN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals, initially and on rehearing (Pet. App. A1-A12, A14-A18), have not yet been reported. The opinions of the district court denying petitioner's motion to dismiss the indictment (R. 9-19) and motion for judgment of acquittal (R. 146-152) are reported at 138 F. Supp. 791 and 149 F. Supp. 912.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1958 (Pet. App. A. 13). A petition for rehearing was denied on April 9, 1958 (Pet. App.,

A 19). The petition for a writ of certiorari was filed on April 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employee of the Bureau of Internal Revenue who conspired to take advantage of his status to solicit and accept $20,000 from a taxpayer, purportedly for the purpose of suppressing an indictment, was properly held to have violated Section 4047(e)(4) of the Internal Revenue Code of 1939 (punishing conspiracy to defraud the United States) although he did not in fact have authority to compromise claims.

2. Whether a prior holding on the same facts (*United States* v. *Waldin*, 139 F. Supp. 156, 158-159), that Section 4047(e)(10) of the Internal Revenue Act of 1939 (punishing attempts to collect money for settling claims) requires proof of color of authority to compromise or settle a taxpayer's alleged violation of law, is *res judicata* on the construction to be placed on Section 4047(e)(4).

3. Whether the Court of Appeals, before which the issue of statute of limitations was first raised on petition for rehearing, properly held that the applicable period was six years.

STATUTES INVOLVED

26 U.S.C. (1946 ed.) 3748(a) provided, in part:

> No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

* * * * *

26 U.S.C. (1946 ed.) 3748(a), as amended by Section 201(a), Miscellaneous Title, Internal Revenue Code of 1954, 68A Stat. 929, read, in part, as follows:

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and except that the period of limitation shall be six years——

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

26 U.S.C. (1946 ed.) 4047(e) provided, in pertinent part:

* * * * *

(e) *Other unlawful acts of revenue officers or agents.* Every officer or agent appointed and acting under the authority of any revenue law of the United States——

* * * * *

(4) Who conspires or colludes with any other person to defraud the United States; or

* * * * *

(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do——

shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years. * * *

STATEMENT

On September 20, 1955, an indictment was filed in the United States District Court for the Eastern District of Pennsylvania which charged, *inter alia*, that petitioner had conspired with unknown persons to defraud the United States of its right to the fair, honest, and disinterested administration of its revenue laws, in violation of 26 U.S.C. (1946 ed.) 4047(e)(4) (R. 3-8). It was the theory of the indictment that petitioner, a Zone Deputy Collector of Internal Revenue in Philadelphia, Pennsylvania, had solicited and accepted $20,000 from a taxpayer, Dr. Francesco Mogavero, in return for which petitioner and his friends were to suppress an allegedly imminent indictment for tax evasion (R. 4-6). After jury trial, petitioner was found guilty (R. 2, 146) and sentenced to two years imprisonment (R. 153). On appeal, the conviction was affirmed, one judge dissenting on the issue of *res judicata*. A

petition for rehearing, which for the first time specifically raised an issue as to the statute of limitations, was considered by a seven-judge panel and denied, three judges dissenting.

1. During the latter part of 1948, the income tax records of Dr. Francesco Mogavero were being examined by revenue agents (R. 24).[1] Dr. Mogavero retained Albert S. Herskowitz, an attorney, for the purpose of ascertaining the amount of the deficiency, if any (R. 25, 45). About the first week in April, 1949, Herskowitz contacted petitioner, a Zone Deputy Collector of Internal Revenue in Philadelphia, told petitioner that he was trying to get information which he could not get from ordinary sources, and asked petitioner to meet him (R. 25-26). Herskowitz took petitioner to Mogavero's office, where the group discussed Mogavero's problem. Petitioner agreed to learn what he could and report back to Herskowitz (R. 26-27). Mogavero had received a telegram from some source reporting that he was going to be indicted, and it was the consensus of opinion among the three that the telegram "was a fake" (R. 36-37). Nonetheless, at that time there was the overhanging threat of indictment (R. 37).

About August 1, 1949, petitioner called Herskowitz and asked him to speak to a friend of petitioner's named McDougal. Petitioner put McDougal on the line and he had a conversation with Herskowitz. Petitioner then came back to the telephone and Herskowitz told petitioner that McDougal had demanded $20,000 to prevent Mogavero's indictment and prosecution for income-tax evasion (R. 27-28). Petitioner replied that

[1] Doctor Mogavero died before this trial (R. 24).

the money was not for either himself or McDougal, but for some other persons who were "* * * going to take care of this thing". He advised Herskowitz that "* * * this would be the best way out * * *" for Mogavero was in serious difficulty. Herskowitz terminated the conversation by telling petitioner that Mogavero's money was not going to be spent for that purpose (R. 29-30).

On September 15, 1949, petitioner called at the home of Dr. Mogavero. In the presence of Mogavero's wife and mother, petitioner told him that "the group" wanted money and also wanted the doctor to discharge Herskowitz because he was rough and crude. In a few minutes the telephone rang (petitioner had advised Mogavero to expect a call) and an unknown person demanded that Mogavero hand over $20,000 in cash. After Mogavero had hung up, petitioner told him that "That is the way the group wants it, and that is the way it has to be done". He gave Mogavero until 7:00 p.m. that evening to make a decision (R. 74-79).

On September 20, 1949, petitioner called Herskowitz and told him that he [petitioner] "* * * had been in touch with Dr. Mogavero, pressing him to accept this proposition of putting up $20,000 to avoid this tax prosecution" (R. 31).

The following day, September 21, 1949, Dr. Mogavero went to the local agents of the intelligence unit of the Internal Revenue Service (R. 46-47). As a result of his conversations with them, agent Edward A. Hill and others were assigned to investigate an alleged extortion by petitioner (R. 48, 50).

About two weeks later, October 5, 1949, Dr. Mogavero obtained $20,000 in cash from his banks and, with the

help of the investigating agents, wrapped it up in a brown sealed package (R. 51, 87-88).

On October 7, 1949, Dr. Mogavero—in possession of the package of money—was seated in his consultation room and three agents, Tucker, DiMaggio and Morris, were posted nearby (R. 60, 64, 90-91). At about 1:00 p.m., petitioner drove up and entered Mogavero's office (R. 52-53). The agents overheard the following conversation between Mogavero and petitioner (R. 65-66, 91-92):

> I heard the voice of Dr. Mogavero say, "Well, here it is. Here is the $20,000. Now, what do I get for it?"
>
> The other voice replied, "Don't worry. You will be shown everything."
>
> Dr. Mogavero continued, "How do I know the whole thing isn't a fake? All along I have wanted you to bring Bill. How do I know I won't be indicted, anyhow?"
>
> The other voice replied, "Don't worry. You will be shown the figures. Everything will be taken care of and you can forget about the indictment. At least I am sure I can guarantee you about the indictment. Those others wouldn't double-cross me."

Seconds later, petitioner walked out of the consultation room with the package of money in his hand. As agents Tucker and DiMaggio stepped forward to apprehend him, petitioner tossed the package behind him into the consultation room. After the arrest was made, petitioner voluntarily said, "I know nothing about this. For all I know the doctor owed my father some money and I was down here to collect it". He also told the agents that he had had a lot of trouble, that his mother

had died, and that his group supervisor would be happy to learn that he "* * * had gotten into a jam" (R. 66-67, 94-95).[2]

The investigation of Doctor Mogavero's tax situation had begun in August 1948 and was continuing as of October 1949 (R. 47). There were indications of a tax deficiency, but the final amount due had not been established and no indictment for income tax evasion was pending (R. 54-55).

During the period of this offense, the principal duties of a zone deputy collector of internal revenue were to collect delinquent taxes and secure delinquent returns within a certain section—in this case, a section of Philadelphia (R. 20-21). Petitioner's zone did not include Doctor Mogavero's residence (R. 23). He did not have official access to the investigation file on Mogavero (R. 55-56).

2. The indictment upon which petitioner's conviction is founded (filed September 20, 1955) charged (1) conspiracy to evade income taxes in violation of 26 U.S.C. (1946 ed.) 145(b) and 18 U.S.C. (1946 ed., Supp. V) 371, and (2) conspiracy to defraud the United States in the fair administration of its internal revenue laws, in violation of 26 U.S.C. (1946 ed.) 4047(e)(4) (R. 3-8).

Prior to trial, petitioner moved to dismiss the indictment,[3] alleging, *inter alia*, that the statute of limita-

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[2] Testifying as a witness, petitioner gave a generally exculpatory explanation of his actions, saying that he advised Mogavero not to pay a $20,000 bribe demanded by persons unknown to petitioner, that he was only holding the money for Mogavero when arrested, and that the doctor "framed" him (R. 102-120). However, petitioner does not in this Court question the sufficiency of the evidence.

[3] He also moved to dismiss an earlier indictment which had been superseded by the present one (R. 9).

tions had run as to the offense laid under 26 U.S.C. (1946 ed.) 145(b) (R. 13). He also urged that the indictment was insufficient to allege an offense under 26 U.S.C. (1946 ed.) 4047(e)(4) for failure to allege that petitioner's fraudulent act was done under the authority of his office (which petitioner contended the statute required) (R. 17-18), and that a prior interpretation of 26 U.S.C. (1946 ed.) 4047(e)(10) was *res judicata* of the interpretation to be given to 26 U.S.C. (1946 ed.) 4047(e)(4).

Petitioner had earlier been indicted, tried, and found guilty by a jury, in 1950, on an indictment—based on the same facts—which alleged that he had violated 26 U.S.C. (1946 ed.) 4047(e)(10) by demanding of, and accepting from Mogavero, the sum of $20,000 as payment for the settlement of an alleged violation of law. Section 4047(e)(10), supra, pp. 3-4, forbids the demanding or accepting of money for the compromise or settlement of any charge or complaint for any violation or alleged violation of law. The district court (Ganey, J.) granted petitioner's motion for judgment of acquittal on the ground that, to be guilty of this offense, an agent of the Internal Revenue Service must have authority or color of authority to compromise, settle, or adjust the taxpayer's alleged violation of law, and that the evidence was clear that petitioner had no such authority or color of authority. *United States* v. *Waldin*, 139 F. Supp. 156, 158-159 (E. D. Pa.). It is this holding [4] which petitioner relies upon as being *res judicata* of the construction to be given Section 4047(e)(4), *supra*.

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[4] Intervening indictments were dismissed for one reason or another, see, for example, *United States* v. *Waldin*, 122 F. Supp. 903 (E.D. Pa.).

In the present case, the district court (Lord, J.) denied the motion in all respects, holding that the statute of limitations applicable to 26 U.S.C. (1946 ed.) 145(b) was six years and not three years; that Section 4047(e)(4), *supra*, required only that petitioner be an employee of the Internal Revenue Department and not that he actually have authority to settle the taxpayer's violation; and that the earlier holding (139 F. Supp. at 158-159, *supra*) was not conclusive of the construction to be given to Section 4047(e)(4), (138 F. Supp. 791; R. 13-16, 18, 19).

At trial, the government conceded that there was no proof of a conspiracy to evade income taxes under 26 U.S.C. (1946 ed.) 145(b) and 18 U.S.C. (1946 ed., Supp. V) 371. The case went to the jury solely on the theory that petitioner had conspired to defraud the United States of its right to have its governmental functions administered honestly under Section 4047 (e)(4), (Pet. 3).

After trial, petitioner moved for a judgment of acquittal, raising the issues of statutory construction and *res judicata* advanced to support his earlier motion to dismiss the indictment. He did not raise any issue concerning the limitation period applicable to Section 4047(e)(4). The motion was denied (149 F. Supp. 912; R. 146-152). The limitation question was first raised in the Court of Appeals on petition for rehearing, where the majority concluded that the objection was not timely and that the applicable limitation period was six years (R. 172-176).

ARGUMENT

1. (a). Petitioner argues this case as though it was one where a person who just happened to be a revenue

officer solicited and accepted a sum of money from a taxpayer while actually acting in his private capacity as a citizen. That is not the situation here.

It is true that there was no showing that petitioner's official position was such that he could compromise Mogavero's tax liability or personally quash any possible indictment. Nonetheless, he was first contacted by Herskowitz because Herskowitz wanted information as to Mogavero's tax deficiency—information not available from ordinary sources or to the public generally—which he thought he could get from petitioner, obviously because of petitioner's status as a revenue officer. Thereafter, petitioner traded on that status by giving Herskowitz and Mogavero expert advice as to the validity of a telegram received by Mogavero, by telephoning Herskowitz with purportedly inside information that Mogavero was going to be indicted, and by soliciting and accepting money on the basis that he could arrange for the suppression of the indictment.

26 U.S.C. (1946 ed.) 4047(e)(4) punished:

> Every officer or agent appointed and acting under the authority of any revenue law of the United States——
>
> * * * * *
>
> (4) who conspires or colludes with any other person to defraud the United States;

It is settled that the United States is defrauded where it is deprived of the honest administration of its functions, *Glasser* v. *United States*, 315 U.S. 60, 66; *Hammerschmidt* v. *United States*, 265 U.S. 182. Here it is clear—even assuming that petitioner is correct in saying that his status as an officer is not enough by itself—that petitioner made affirmative use of that status by

demanding and accepting money on the premise that he was, by virtue of his position, able to suppress (or cause to be suppressed) a tax indictment. Petitioner was trading on his position as a revenue officer. It is proper that he be held to the standard of a revenue officer.

(b). In any event, it is enough to constitute a violation of 4047(e)(4) that petitioner conspired to defraud the United States in connection with the revenue when he was in fact a revenue officer or agent. Section 4047 (e) reflects the philosophy that, because of the special position which they occupy by the very fact of their employment, revenue officers and agents must be held to a standard higher than that for persons outside the service. It draws a distinction between those offenses which result from the power of office—and therefore require proof of power—and those which result merely from the fact that the defendant is a revenue agent, a member of the group which must be above suspicion. The offense here is in the latter category.

26 U.S.C. (1946 ed.) 4047(e), *supra*, pp. 3-4, punishes ten separate acts which may be committed by revenue agents or officers. Five of these offenses, each set forth in a separate subsection, require that there be an official connection between the duties of the officer or agent and the unlawful act. The other five subsections, of which 4047(e)(4) is one, are stated in general terms and contain no such requirement. Clearly, Congress knew how to phrase each subsection so as to require such official connection, and its failure to do so in 4047 (e)(4) is strong evidence of an intent not to require proof of a connection between petitioner's duties and the object of the conspiracy to make out the offense. See *Benanti* v. *United States*, 355 U.S. 96, 165.

Section 4047(e)(1), for example, reads as follows:

> Every officer or agent appointed and acting under the authority of any revenue law of the United States——
>
> (1) who is guilty of any extortion or willful oppression *under color of law*; * * * shall be dismissed from office [etc.]. [Emphasis added.]

Subsection (e)(2) deals with an officer or agent who demands or accepts any compensation other than that prescribed by law "* * * for the performance of any duty"; hence it is logical to conclude that for the purposes of that subsection there must be some connection between the duties of the official and the object of the conspiracy. *United States* v. *Gerdel*, 103 F. Supp. 635 (E. D. Mo.). Similarly, subsection (e)(3) (dealing with the agent "* * * Who willfully neglects to perform any of the duties enjoined on him by law")—subsection (e)(8) (punishing the agent who makes a false book entry or return "* * * where he is by law or regulation required to make any entry, certificate, or return")—and subsection (e)(10) (which reaches the agent who demands or accepts a payment "* * * for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law")—all of necessity require that the revenue official or agent must be in a position where it is at least possible that he can bring about the evil end through official action. However, subsections (e)(4), (5), (6), (7), and (9) cast a different image. They are broader in language and do not depend upon proof that the revenue agent personally has the official authority to suppress indictments.

Subsection 4047(e)(4), the statute violated here, punishes every officer or agent "* * * Who conspires or colludes with any other person to defraud the United States". Subsections (5), (6), (7), and (9) are phrased in equally general terms; they do not require that the agent have the official power to bring about the criminal result. It is enough that the offender be a revenue officer or employee. See *United States* v. *Grunewald, et al.*, 233 F. 2d 556, 567 (C. A. 2), reversed on other grounds, 353 U. S. 391; *United States* v. *Warren*, 120 F. 2d 211 (C. A. 2). The United States is equally defrauded under Section 4047(e)(4) if an agent induces a fellow employee, who does have the authority, to drop a case.

Section 7214(a) of the Internal Revenue Code of 1954 strengthens our argument that a revenue officer need not have the personal power to suppress an indictment and yet may violate Section 4047(e)(4). The new statute reaches "Any officer or employee of the United States acting in connection with any revenue law of the United States." The only change thought significant by the Senate was that from "agent" in the old law to "employee" in the new, for they were the only words italicized in the Senate Report, U. S. Code Cong. and Adm. News, 1954, p. 5254-5255. We think the phrase "* * * acting in connection with any revenue law * * *" merely means that the employee must be, like petitioner, someone engaged in some manner in administering the tax laws.

2. The issue that was before the district court during petitioner's prior trial for violation of Section 4047(e)(10) and which was the basis of the decision is succinctly summarized in the opinion itself, *United States* v. *Waldin*, 139 F. Supp. 156, 158-159:

> In support of his motion for judgment of acquittal, the defendant contends that before an

agent of the Bureau of Internal Revenue can be found guilty under Sec. 4047(e)(10) of the Internal Revenue Code, the government must prove that at the time the agent demanded or accepted the money he must be acting under the authority of the revenue laws. Against the motion, the attorney for the government argues that the agent need not be acting under the authority of law at the critical time in order to convict him. In other words, he maintains that the words: "and acting under the authority of any revenue law of the United States" in the code means, "and during his appointment". We cannot agree. The words of the section are plain. Before an agent can be convicted under it, he must have authority, or at least color of authority, to compromise, adjust or settle the taxpayer's violation or alleged violation of law. It is true that such an interpretation makes this section a duplication of 18 U. S. C. § 202, concerning the acceptance of solicitation of money by employees of the United States for the purpose of having his decision or action in a matter influenced thereby. But we think the greater penalty under Section 4047(e)(10) may have been one of the reasons why this particular section was not repealed by the criminal code of 1948.

Since the defendant in the instant case had no authority or color of authority to compromise, adjust or settle the taxpayer's alleged violation of law, he cannot be indicted under this statute. This conclusion is reached with extreme reluctance, as the defendant's conduct throughout was extremely reprehensible.

This cannot be properly read as holding more than that, for the purpose of subdivision (10) of 4047(e)—

which punishes a revenue agent who demands money "for the compromise, adjustment or settlement of any charge"—the agent must, in the words of the prior opinion, "have authority, or at least color of authority, to compromise, adjust or settle the taxpayer's violation or alleged violation of law." The court was addressing itself to the particular offense before it. It was not deciding that petitioner was not a revenue agent. No more was it deciding what acting "under the authority of any revenue law" meant when the authority related to anything other than the taking of money for adjusting claims.

The prior trial did finally adjudicate as a fact that petitioner lacked authority or color of authority to compromise, adjust, or settle Mogavero's violation or alleged violation of law. That fact was not challenged at this trial. The prior trial also finally adjudicated for petitioner as a matter of law that color of authority to settle was necessary to hold a revenue agent liable for taking money for settling claims. That adjudication of law was not challenged in the present trial. The question here—whether a revenue agent defrauds the United States in violation of subsection (4) when he demands money even though he has no official power to fix the case—was not and could not have been determined at the prior trial where it was not in issue, as a matter of fact or of law.

For this reason, this trial involves no conflict with the principle that, where the second trial is for a *different* offense, issues which were actually litigated and decided in the first trial cannot be relitigated. *Sealfon* v. *United States*, 332 U. S. 575, 578; *United States* v. *Adams*, 281 U. S. 202, 205; see *Frank* v. *Man-*

gum, 237 U. S. 309, 334; cf. *United States* v. *Oppenheimer*, 242 U. S. 85, where an erroneous unappealed judgment, entered before jeopardy attached, that a criminal prosecution was barred by the statute of limitations, was held to bar a second prosecution for the *same* offense. Moreover, *res judicata* does not apply to pure questions of law even between the same parties where the demand in a civil suit is on a wholly different claim, *United States* v. *Moser*, 266 U. S. 236, 242. By analogy, the prior ruling that Section 4047 (e)(10), *supra*, requires a showing of official authority is not binding on the government in a proceeding under Section 4047(e)(4).

3. In his petition for rehearing in the Court of Appeals, petitioner contended for the first time that the prosecution under Section 4047 (e)(4) of the Internal Revenue Code was barred by the statute of limitations. Admittedly, for all offenses committed by revenue officers since enactment of the Internal Revenue Code of 1954, the period of limitations is six years. 26 U.S.C. (Supp. V) 6531(7). Moreover, it is clear that the enactment of the Code of 1954 did not shorten any period of limitations as to prior offenses. Section 7851(d) expressly provides that any offense not barred on the date of the enactment of the 1954 Code shall not be barred because of any provision in the new Code. Section 201(a), Miscellaneous Title, Internal Revenue Code of 1954, 68A Stat. 929 (*supra*, p. 3), did increase the period of limitations for offenses by revenue officers to five years, where the prior period had been three. But there is nothing in its language or legislative history to show that if the limitations period for a prior offense was six years,

the period was to be cut down to five, and as noted above Section 7851(d) clearly indicates the contrary intent.[5] Both prior to and after that amendment, Section 3748(a) provided a six year statute of limitations

> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.[6]

In 1954 there was before the Senate (83d Cong., 1st Sess.) S. 1451 and (83d Cong., 2d Sess.) S. 3310, which were companion bills. S. 1451 would have extended the general statute of limitations (18 U.S.C. 3282) from three to five years. S. 3310 would have extended both the general statute of limitations and the three year provision of Section 3748(a) to five years. It was the opinion of Senators Holland and Johnston, two members of the Subcommittee of the Committee on the Judiciary,

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[5] The petitioner's reliance on *Grunewald* v. *United States*, 353 U.S. 391, (Pet. 8-10) is misplaced. Insofar as that prosecution was under the general conspiracy statute (18 U.S.C. 371), the special limitations of 26 U.S.C. 3748 applicable to revenue offenses are obviously inapplicable. As to the trial court's instructions with respect to the one count brought under 26 U.S.C. 4047 (e) (4) in which the court referred to a five year limitation, the issue there was not between five and six years, but whether the prosecution was barred by the basic three year limitation. On the theory here supported, the limitation for the count in the *Grunewald* case based on § 4047 (e) (4) should have been six rather than five years.

[6] The petitioner makes no claim that in the absence of the 1954 amendment this six year limitation would be inapplicable to the offense here charged. The holding of *Bridges* v. *United States*, 346 U.S. 209, that the wartime suspension of limitations for offenses involving fraud against the United States did not apply to non-pecuniary fraud is not applicable here. The Court's construction was based on the purpose of the specific suspension law and, in any event, any fraud in relation to the administration of the revenue laws has a pecuniary aspect.

which held hearings on the bills, that S. 3310 would *not* cut back the six year period then applicable to offenses involving defrauding the government, and no one disputed this. It was their opinion that the bill would simply establish a new five year *minimum* limitation period for all offenses. Hearings of April 21, 1954, Committee on the Judiciary, 83rd Cong., 2d Sess., p. 5.

Some two months later, when the Internal Revenue Code of 1954 was before the Senate, Senator Williams offered Section 201, Miscellaneous Title, as an amendment. He expressly stated that the amendment embodied the same features as S. 3310, *supra*, raising the statute of limitations to five years for *all* offenses. 100 Cong. Rec. pp. 9490-9491. The amendment was accepted and went to conference. There it was changed so as to delete that portion amending the general statute of limitations. The net result is that Congress intended to and did raise the statute of limitations from three to five years for some offenses by revenue officials and agents, but did not reduce the six year period for those offenses previously so governed.

Moreover, as mentioned above, petitioner did not raise the issue of the statute of limitations until he petitioned the Court of Appeals for rehearing. We urge that the Court of Appeals was correct in saying that the claim of error came too late. Although there is little authority on the question, what authority there is supports the court below, *United States* v. *Franklin*, 188 F. 2d 182, 186 (C.A. 7); *Pruett* v. *United States*, 3 F. 2d 353, 354 (C.A. 9), and we have not found any cases to the contrary. The fact that petitioner may raise the defense of limitations under a general plea of not guilty, *United States* v. *Barber*,

219 U.S. 72, 78; *United States* v. *Kissel*, 218 U.S. 601, 610, does not mean that he cannot also waive the defense. The cases relied upon by the dissent below for the proposition that the government must show that the offense was prosecuted in time are cases where either the objection was raised at trial (*United States* v. *Schneiderman*, 106 F. Supp. 892 (S.D. Cal.)) or the report is silent as to that (*Az Din* v. *United States*, 232 F. 2d 283 (C.A. 9)).[7]

CONCLUSION

The decision below is correct, for the reasons discussed above. The issues raised by petitioner have no general significance since they are either limited to the facts of this case or relate to prior statutes no longer in effect. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] Although petitioner asserts that he has been denied due process and subjected to "double jeopardy doubled" (Pet. 13) as a result of several indictments being brought against him, he does not claim that the defense of double jeopardy was available to him in his second trial for a separate offense. Cf. *Wade* v. *Hunter*, 336 U.S. 684, 688-690. The quashing of a bad indictment is no bar to a prosecution upon a good one. *United States* v. *Oppenheimer*, 242 U.S. 85, 87; *United States* v. *Narvaez-Granillo*, 119 F. Supp. 556, 559 (S.D. Cal.).

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